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No. 86-799

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JULIE FISHER,
Appellant,

VS.

THE COPLEY PRESS INC., YVONNE LARSEN,
W. DANIEL LARSEN, JOSEPH HARMON,
EDWIN GRAY and MICHAEL SCOTT-BLAIR,
Appellees.

On Appeal from the Court of Appeal of the State of California, Fourth Appellate District

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellees THE COPLEY PRESS, INC. and MICHAEL SCOTT-BLAIR respectfully move to dismiss the appeal on the grounds that there is an adequate non-federal basis for the judgment and that the appeal does not present a substantial federal question, and alternatively move to affirm the judgment on the ground that it is correct.

MOTION TO DISMISS

I.

THIS COURT SHOULD DISMISS THE CASE BECAUSE THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

A. The Proceedings Below

Appellant JULIE FISHER, an unsuccessful candidate for reelection to the San Diego Board of Education, filed this action for libel and slander in 1978 against her opponent, YVONNE LARSEN, her opponent's husband, W. DANIEL LARSEN, her opponent's campaign workers, JOSEPH HARMON and EDWIN GRAY ("the LARSEN campaigners"), THE COPLEY PRESS, INC. and its reporter MICHAEL SCOTT-BLAIR arising out of campaign statements and coverage of the political campaign.

The hotly contested election closely followed an illegal, widely publicized teachers' strike by the San Diego Teachers' Association after which FISHER and other school board members granted amnesty to the strikers although the strike activities violated a court injunction. During the primary and general election campaigns, FISHER and LARSEN engaged in a series of claims and counterclaims concerning their positions on the issues which were reported in the media.

The case involving the LARSEN campaigners proceeded before a jury in July, 1984.[1] After a three-week

[1]In the proceedings below, the appellees had initially obtained summary judgments in their favor. The appellate court, acting before this Court's pronouncement in *Jack Anderson v. Liberty Lobby, Inc.*, 477 U.S. ____, 91 L.Ed.2d 202 (1986) and before the California Supreme Court decision in *Reader's Digest Assn. v. Superior Court*, 37

trial in which the jury had the opportunity to see the witnesses and evaluate the credibility of the parties, the jury returned a verdict in favor of the LARSEN campaigners, finding that the statement "Do taxpayers like it when JULIE FISHER appears at union rallies and supports their demands" was true, that the statement that "JULIE FISHER was associated with the teachers' strike every step of the way" was true, that the statements about FISHER's "blackmail" of the school superintendent were true, and that the statement concerning "JULIE FISHER's collaboration last spring with the striking teachers" was true.

At the trial of the defense that FISHER had failed to comply with the retraction statute, California Civil Code Section 48a, FISHER admitted that she had failed to demand written retraction of the statement in issue, and judgment was entered accordingly for these Appellees.

B. The Truth of the Allegedly Defamatory Statements Is an Adequate Non-Federal Ground for Dismissal

At trial, the school superintendent testified that FISHER participated in the strike and worked on the side of the teachers. An attorney for the school district testified that FISHER supported the teachers in the strike. The school board president stated that FISHER was "100% on the side of the striking teachers." Evidence showed that FISHER assisted union leaders in modify-

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Cal.3d 244 (1984), determined that there was a triable issue of fact without applying a clear and convincing evidence standard. Had the clear and convincing evidence standard been used by the appellate court in reviewing the summary judgments, the case would probably not have proceeded to trial. However, since the jury found that the allegedly defamatory statements were true and FISHER admitted her failure to demand written retraction of the other statement in issue, the results are support for dismissal on the ground that there are adequate non-federal bases for the judgment.

ing their demands and sought support for the union demands from the superintendent and the other Board members. A witness testified that FISHER loaded picket signs into a teacher's van after one of the rallies. The teachers cheered FISHER and the union president hugged her during a rally. FISHER denied any such interaction with the union president at this rally, but the photographs of the event belied her testimony. Although FISHER claimed that she did not threaten the school superintendent in a meeting attended by only FISHER and the superintendent, the jury heard both accounts, and chose to believe the school superintendent.

The trial court instructed the jury that the LARSEN campaigners had the burden of proving the truth of the allegedly defamatory statements. Despite this heavy burden, the LARSEN campaigners proved the truth of the challenged statements.[2] Consequently, there is an adequate non-federal basis for the verdict. In FISHER's continuing attempt to change through the judicial process what she lost in the political process, FISHER ignores the fact that twelve members of the community disbelieved her. In light of the jury's finding that the allegedly defamatory statements were true, there is no basis for further review by this Court.

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[2]It is unnecessary for this Court to determine whether FISHER should have had the burden of proof after *Philadelphia v. Hepps*, 475 U.S. ____, 89 L.Ed.2d 783 (1986) because the LARSEN campaigners sustained their burden of proving truth. Furthermore, there is no need for an independent review of the record because the jury did not reach the constitutional issues by finding that the allegedly defamatory statements were true.

C. FISHER's Failure to Comply With California Civil Code Section 48a Is an Adequate Non-Federal Ground for Dismissal

At the trial of the retraction defense concerning the statement that "Fisher has repeatedly said that she would support the striking teachers," FISHER admitted that she had failed to comply with the retraction statute. California Civil Code Section 48a states in pertinent part:

> Plaintiff shall serve . . . a written notice specifying the statements claimed to be libelous and demanding that the same be corrected.

FISHER testified in her deposition that she had made no request for retraction of the allegedly defamatory portion of the article. FISHER was subpoenaed to bring any written demand for retraction to a hearing, but FISHER failed to produce such a retraction and admitted that she did not believe she had ever demanded retraction of the statement in issue. At the trial, FISHER again admitted she had not made written demand for retraction of the statement.

Based on FISHER's undisputed admissions that she had not complied with the retraction statute, the court necessarily granted judgment for THE COPLEY PRESS, INC. and MICHAEL SCOTT-BLAIR because FISHER had no special damages. *Fisher v. Larsen,* 138 Cal.App.3d 627, *cert. denied,* 464 U.S. 959 (1983).

This Court should dismiss the case on the basis that the judgment in favor of these Appellees rests on an adequate non-federal ground, FISHER's admitted failure to comply with the California retraction statute, Civil Code Section 48a.

II.

THIS COURT SHOULD DISMISS THE CASE ON THE GROUND THAT IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. There Is No Need for the Court to Find an Implied Right to Reputation in the Constitution

FISHER seeks to have this Court broaden the Constitution by finding an implied right to reputation as a part of the penumbra of First Amendment protections. That broadening of the Constitution is unnecessary for the reason that the case can be decided on non-constitutional grounds — truth of the statements and failure to comply with a state statute. Therefore, there is no reason to have this case determine whether the Court should further broaden implied First Amendment rights.

B. There Is No Basis to Drastically Limit the Right to Express An Opinion

This case involves political candidates expressing their political views in the midst of a hotly contested election. Even in political speech, FISHER seeks to have this Court limit the express constitutional protection of free speech and drastically change the right to express an opinion. FISHER disagrees with Justice Powell's statement in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) that:

> Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Justice Powell's statement is correct. The history of political speech in the United States has been punctuated by instances of caustic and vehement rhetoric. See *Desert*

Sun Publishing Co. v. Superior Court, 97 Cal.App.3d 49, 51-53 (1979). The Court in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) recognized the value to society that debate on public issues be uninhibited, open and robust. FISHER's attempt to radically limit the First Amendment right of free speech is unwarranted and fails to raise a substantial federal question.

C. The State Retraction Statute Is Constitutional

1. The Retraction Statute Satisfies the Due Process Clause

The Constitution permits the Legislature to limit tort recoveries, so long as the legislative action bears a rational relationship to the objective sought to be achieved. *Werner v. Southern California Associated Newspapers,* 35 Cal.2d 121, 125 (1950), *appeal dismissed,* 340 U.S. 910 (1951). The retraction statute, California Civil Code Section 48a, bears a rational relationship to the objective of the statute.

The *Werner* court identified two bases on which the Legislature could reasonably conclude that Section 48a could limit recovery to special damages absent a written demand for retraction: (1) the dangers of excessive recoveries of general damages in libel actions and (2) the public interest in free dissemination of the news. Each rationale remains valid after *New York Times v. Sullivan.*

By requiring a potential plaintiff to demand a retraction from a publisher, Civil Code Section 48a protects a newspaper from the expense of litigation and the chilling effect of general or punitive damages by providing an opportunity to retract the publication. *New York Times v. Sullivan* has not eliminated the need for this protection.

Even with the malice requirement under *New York Times v. Sullivan,* publishers still face the problem that

some plaintiffs may bring meritless suits with the hope that a "deep-pocket" publisher might settle rather than bear the time and expense of a lengthy lawsuit. *New York Times v. Sullivan* does little to cure this problem. But Civil Code Section 48a, by requiring a retraction within a certain period, diminishes the number of such suits by reasonably limiting the time in which plaintiffs can seek a retraction and the amount which may be recovered.

As the court stated in *Werner v. Southern California Associated Newspapers*, 38 Cal.2d at 128:

> The Legislature may reasonably conclude that the public interest in the dissemination of news outweighs the possible injury to a plaintiff from the publication of a libel, and may properly encourage and protect news dissemination by relieving all but special damages resulting from defamation.

Civil Code Section 48a also protects the individual by providing the newspaper with an incentive, the limitation of damages, to issue a retraction in an appropriate case. A prompt retraction may be more important to a public figure than a potential judgment through litigation. Additionally, the state has a legitimate interest in encouraging settlements. *American Motorcycle Assn. v. Superior Court*, 20 Cal.3d 578, 603 (1978).

Since the Legislature could reasonably conclude that the retraction statute is rationally related to several legitimate state interests in encouraging the free dissemination of news, avoiding protracted litigation and promoting settlements, the retraction statute satisfies the due process clause.

2. The Retraction Statute Satisfies the Equal Protection Clause

There are rational bases for the classification set forth by California Civil Code Section 48a. The Legislature

could reasonably conclude that newspapers and radio stations are likely targets of defamation suits. To encourage the free dissemination of the news, the Legislature could reasonably determine that the retraction statute is necessary to prevent excessive recoveries and the chilling effect of protracted litigation.[3]

Additionally, the Legislature could reasonably conclude that retraction is more effective if widely circulated by a newspaper or radio station than if circulated by an individual. As stated by one court:

> Now, as far as vindication of character or reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages. *Allen v. Pioneer Press Company*, 40 Minn. 117, 124, 41 N.W. 936 (1889).

Moreover, newspapers are subject to an increased risk because of the frequency of publication, the deadlines, and the collection of information from varied sources. Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 So.Cal.L.Rev. 902, 932 (1974).

The retraction statute does not eliminate the right to bring suit for damages. If a timely request for retraction is made by an individual, and denied, there are no limitations on damages. If there is no timely request for a retraction, the individual may still sue for special dam-

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[3]The Legislature has limited tort recoveries in other settings which have survived constitutional attack. See, e.g. *Fein v. Permanente Medical Group*, 38 Cal.3d 137 (1985) (limitation of noneconomic damages in medical malpractice actions), *Cory v. Shierloh*, 29 Cal.3d 430 (1981) (civil immunity for certain providers of beverages).

ages. Thus, the classification is constitutional under the equal protection clause since the Legislature could reasonably conclude that there are rational bases for the retraction statute.

D. The Court Should Dismiss the Case

On the basis of the foregoing, Appellees respectfully request that this Court dismiss the appeal on the grounds that there are adequate non-federal bases for the judgment and that the case fails to present a substantial federal question worthy of this Court's review.

MOTION TO AFFIRM

Alternatively, Appellees move to affirm the judgment on the grounds that the decision is correct. FISHER had a fair and impartial trial on the issues and lost. The jury evaluated her credibility and found that the allegedly defamatory statements were true. The trial court heard FISHER's admission that she failed to demand retraction of the statement in issue. The appellate court "read, reread, and scrutinized the record" and "concluded that the criticism of Judge Fargo who has patiently presided over these proceedings for several years is totally baseless." See A-31. Years have passed since the 1977 school board election. It is time for this Court to finally conclude the protracted litigation over this political debate and affirm the judgment in favor of Appellees.

Respectfully submitted,

MARILYN L. HUFF
Counsel for Appellees
The Copley Press, Inc. and
Michael Scott-Blair

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 16, 1986, I served the within Motion to Dismiss or Affirm in re: "Julie Fisher v. The Copley Press Inc.," in the United States Supreme Court, October Term 1986, No. 86-799;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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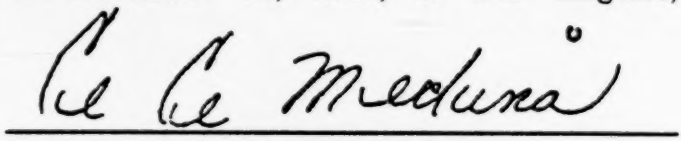
3726 Charles Street
San Diego, CA 92106

Oscar Irwin
Hillyer and Irwin
530 B Street, Suite 1400,
San Diego, CA 92101

All Parties required to be Served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 16, 1986, at Los Angeles, California



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